IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	NO. 91-570-14
	:	
LEROY JACKSON	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. July 29, 2009

Petitioner Leroy Jackson ("Petitioner") is serving a 360-month term of imprisonment for conspiracy to distribute cocaine and heroin, and one count of distribution of crack cocaine. Petitioner seeks reduction of his sentence in light of Amendment 505 (elimination of drug offense levels 40 and 42).[1] He also seeks the reduction of his sentence under Amendment 706 to the United States Sentencing Commission Guidelines (the "Guidelines"), which altered § 2D1.1 of the Guidelines to reduce the sentencing ranges applicable to crack offenses. For the reasons that follow, the petition for reduction of sentence will be denied.

I. BACKGROUND

A. Petitioner's Sentence

On July 10, 1992, 26 individuals, including Petitioner, were charged with various offenses arising from the

[1] Petitioner also seeks reduction of his sentence pursuant to Amendment 536. Since Amendment 536 only serves to make Amendment 505 retroactive, this argument is more appropriately considered in conjunction with Amendment 505.

activities of a drug distribution gang known as the "Junior Black Mafia" ("JBM"). Petitioner was charged with one count of conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. § 846, and one count of distribution of crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(A). On July 14, 1992, Petitioner was convicted of both offenses.

As set forth in the PSR, the Probation Office estimated that JBM distributed in excess of 1,000 kilograms of cocaine during the course of the conspiracy, as well as smaller quantities of heroin. PSR ¶ 23. Upon release from prison on an unrelated drug conviction, Petitioner participated in the conspiracy from early 1988 to 1991 as a senior adviser and "squad leader." PSR ¶¶ 8, 10, 36-37. During this period, the Probation Office determined that Jackson was responsible for conspiring to distribute 700 kilograms of cocaine. PSR ¶ 37. Petitioner was also convicted of distributing approximately 166 grams of crack. PSR ¶ 37.

Petitioner's base offense level was initially at 40, but was subject to a two level enhancement to level 42 because guns were possessed during the course of the conspiracy. Petitioner was in criminal history category IV, resulting in a Guideline range of 360 months to life imprisonment. On July 20, 1993, Petitioner was sentenced to 360 months imprisonment.

B. Changes to the Sentencing Guidelines

1. Amendment 505

On November 1, 1994, the Sentencing Commission adopted Amendment 505, which modified the Base Offense Levels in controlled substance cases. Amendment 505 deletes Base Offense Levels 42 and 40 and replaces them both with Level 38; leaving Level 38 as the maximum level. 18 USCS Appx C, Amend 505. Though the maximum Base Offense Level for a controlled substance case would now be 38, the Amendment does allow for a Base Offense Level above 38 in "extraordinary cases." 18 USCS Appx C, Amend 505. An example of this would be when the quantity of drugs involved is at least ten times the minimum quantity required for a Base Offense Level of 38 (such as 1.5 to 3.5 kilograms of cocaine base). 18 USCS Appx C, Amend 505.

2. Amendment 706

On November 1, 2007, the United States Sentencing Commission (the "Commission") adopted Amendment 706 to the Guidelines to address what the Commission had come to view as unwarranted disparities in the sentences of defendants who possess or distribute various forms of cocaine. Prior to November 1, 2007, the Guidelines provided for a 100-to-1 ratio in sentences for crimes involving cocaine powder compared to those

involving crack.[2] For example, § 2D1.1 of the Guidelines provided the same base offense level for a crime involving 150 kilograms or more of cocaine powder and for one involving 1.5 or more kilograms of crack. U.S.S.G. § 2D1.1(c)(1) (2006).

Under the November 1, 2007 amendment, the ratio between powder and crack sentences has been decreased. For example, 150 kilograms of cocaine powder is now treated as the equivalent of 4.5 kilograms of crack. U.S.S.G. § 2D1.1(c)(1) (2007). The bottom line for individual defendants is that a defendant sentenced under § 2D1.1 for a crack offense after November 1, 2007 receives a base offense level that is two levels lower than what he would have received for the identical offense if he had been sentenced before the November 1, 2007 amendment. 18 USCS Appx C, Amend 706.

The Commission also altered the calculation of base offense levels for offenses involving crack and other controlled substances to reduce the impact of a crack conviction. Id. at 1158-59. The base offense level for these offenses is determined by converting the amount of each substance into a comparable amount of marijuana and then determining the base offense level

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[2] This ratio was derived from the 100-to-1 ratio created by Congress in its statutory mandate of minimum sentences for cocaine offenses. See Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841(b)(1) (requiring a five-year mandatory minimum penalty for a first-time trafficking offense involving 5 grams or more of crack, or 500 grams of powder cocaine).

for that amount of marijuana. U.S.S.G. § 2D1.1, comment 10(A)-(E). Amendment 706 provides that a given amount of crack translates into a lesser quantity of marijuana than it did under the old Guidelines. 18 USCS Appx C, Amend 706; compare U.S.S.G. § 2D1.1 (2007), with U.S.S.G. § 2D1.1 (2006). Thus, post-amendment Guidelines ranges for crimes involving cocaine base and other controlled substances are also lower than ranges for the same crimes pre-amendment.

The Commission based Amendment 706 on "its analysis of key sentencing data about cocaine offenses and offenders; [a] review[] [of] recent scientific literature regarding cocaine use, effects, dependency, prenatal effects, and prevalence; research[] [on] trends in cocaine trafficking patterns, price, and use; [a] survey[] [of] the state laws regarding cocaine penalties; and [the Commission's] monitor[ing] [of] case law developments." 18 USCS Appx C, Amend 706. This information led to the conclusion that "the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." 18 USCS Appx C, Amend 706. The Commission "predicts that, assuming no change in the existing statutory mandatory minimum penalties, this modification to the Drug Quantity Table will effect 69.7 percent of crack offenses sentenced under § 2D1.1 and will result in a reduction in the estimated average sentence of all crack offenses from 121 months

to 106 months .. . .” 18 USCS Appx C, Amend 706.

II. MOTION FOR RESENTENCING

For a second time, Petitioner moves for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2) on the basis of Amendments 505 and 706 of the Guidelines because of recent changes to the Guidelines in the treatment of offenses involving crack cocaine. Petitioner’s previous motion for resentencing was denied on November 19, 1996, and relied primarily on Amendment 505.

Section 3582(c)(2) provides the authority to reduce a sentence only if “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” § 3582(c)(2). The applicable policy statement, § 1B1.10(a), provides that if “the Guideline range applicable to th[e] defendant has . . . been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below,” a reduction in the defendant’s term of imprisonment is authorized under § 3582(c)(2). § 1B1.10(a).

A. Law of the Case Doctrine and Amendment 505

Petitioner argues that the government’s use of the “law of the case” doctrine from Bridge v. United States Parole Commission, 981 F.2d 97 (3d Cir. 1992) precludes Petitioner from

addressing the Amendment 505 aspect of Petitioner's motion as it was already ruled upon at trial. The law of the case doctrine precludes revisiting issues that a court previously decided in earlier stages of litigation. E. Pilots Merger Cmte. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.), 279 F.3d 226, 232 (3d Cir. 2002); United States v. Tykarsky, 295 F. App'x 498, 499 (3d Cir. 2008) (applying the law of the case doctrine in a criminal matter) (not precedential); see also Pendleton v. Nepa Cmty. Fed. Credit Union, 303 F. App'x 89, 90 (3d Cir. 2008) (citing In re City of Phila. Litig., 158 F.3d 711, 718 (3d Cir. 1998) (not precedential); United States v. Schindler, Crim. No. 91-00063-15, 2000 WL 876902, at *6 (E.D. Pa. June 13, 2000) (citing United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997)). Specifically, the law of the case doctrine precludes defendants from "re-litigating challenges to their sentences in successive § 3582(c)(2) motions." United States v. Lopez, 296 F. App'x 922, 923 (11th Cir. 2008).

The doctrine does not apply, however, when there are "extraordinary circumstances." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (U.S. 1988). These include circumstances where: "(1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision is clearly erroneous and would create manifest injustice." In re City of Phila. Litig., 158 F.3d at 718 (citing

Pub. Interest Research Group of N.J., Inc. v. Magnesium Electron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997)).

Here, Petitioner is procedurally barred from bringing this motion under the law of the case doctrine. First, Petitioner presents no new evidence. Second, there is no applicable supervening new law that provides the relief Petitioner seeks. Third, the earlier decision to not grant relief under Amendment 505 was in accordance with 18 U.S.C. § 3553[3] and therefore not erroneous. In this instance, there are no such "extraordinary circumstances," and even if Amendment 505 were revisited and applied, there would be no change from the current sentence of 360 months to life imprisonment. Accordingly, Petitioner is procedurally barred from bringing this motion because of the law of the case doctrine.

B. Amendment 706 Does Not Lower Petitioner's Guideline Range

Petitioner's motion for resentencing must be denied because Amendment 706 does not lower his Guideline range. Section 1B1.10(a)(2)(B) excludes sentence reduction relief pursuant to § 3582(c)(2) and Amendment 706. Section

[3] 18 U.S.C. § 3553(a) requires that the court consider: (1) the nature and circumstances of the offense; (2)the need for the sentence imposed; (3) the kinds of sentences available; and (4) the kinds of sentence and sentencing range established for the category of offense, subject to any amendments made to the guidelines by Congress. § 3553(a).

1B1.10(a)(2)(B) requires that a petitioner's Guideline range must be lowered by § 3582(c)(2) for it to be applicable. Amendment 706 generally reduces the offense levels of crack cocaine offenses by 2 levels. Here, Petitioner's base offense level was set by the quantity of cocaine (530 kilograms) and not the quantity of crack (166 grams). The quantity of crack had no effect on the base offense level of 40. Along with the criminal history adjustments, the Guideline range was set to 360 months to life. While Amendment 505 would reduce the highest base level for this offense to 38, as stated before, the Guideline range would not change from 360 months to life.

Amendment 706 only lowered base offense levels for those offenses involving less than 4.5 kilograms of crack. Since any offense involving more than 150 kilograms of cocaine carries the highest base offense level of 38, and Petitioner's offense involved 530 kilograms of cocaine, his base offense level remains at 38, and therefore his Guideline range remains at 360 months to life imprisonment without even considering the amount of crack

involved. Considering either condition, Amendment 706 has no effect on Petitioner's Guideline range, so his motion for a reduction must be denied.[4]

C. Booker Does Not Provide the Authority to Resentence Petitioner

Petitioner also argues that, based on the Supreme Court decision in United States v. Booker, 543 U.S. 220 (2005) the

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[4] Petitioner also argues for a reduction of sentence based on a literal analysis of the following text from 18 U.S.C. § 3582(c)(2):

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment . . . .

Petitioner argues that the use of the verb "reduce" means "change the number of months of imprisonment to a lesser number," and that the passive voice use of the verb "lowered" should be presumed to have been used differently. Petitioner goes on to note that the use of different words demonstrates Congress's intent to convey different ideas and that there is room for a judge to use discretion in applying sentence reduction on this basis.

Petitioner's argument is flawed in that it fails to recognize that the verb "lowered" is in reference to the sentencing range. In this instance, despite any reduction in offense level, Petitioner's sentencing range of 360 months to life has not changed. See § 1B1.10(c)(2)(B). In addition, Petitioner's argument that Amendment 505's reduction of the highest Section 2D1.1 base offense level to 38 would also entitle him to a sentence reduction is similarly flawed in that Petitioner's offense level reduction to level 38 from 42 would not alter his sentencing range. See § 1B1.10(c)(2)(B). Accordingly, Petitioner would not qualify for a resentencing based upon § 3582(c).

Court is free to reduce his sentence to any degree it deems appropriate. Id. (holding Guidelines are advisory). Specifically, Petitioner suggests that "once the gate to a reduced sentence opens under section 3582(c)(2), the Court is bound only by the 'overarching provision' in § 3553(a)." (Pet'r's Am. Mem. Supp. Mot. Red. Sent. 18, doc. no. 608.) According to Petitioner, the overarching instruction calls for the court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of this section]." § 3553(a).

The Court recognizes that the Guidelines are now advisory and that unwarranted sentencing disparities can be considered as part of the sentencing equation. However, Congress's directive that sentences are final unless a reduction is consistent with the Guidelines policy statements is controlling. Therefore, the Court may not, under the guise of applying § 3582, reduce Petitioner's sentence when the applicable guideline range has not been addressed by Amendment 706. United States v. Mateo, 560 F.3d 152, 155 (3d Cir. 2009); see, e.g., United States v. Melvin, 556 F.3d 1190 (11th Cir. 2009) ("[c]oncluding that Booker . . . do[es] not apply to § 3582(c)(2) proceedings, we hold that a district court is bound by the limitations on its discretion imposed by § 3582(c)(2) and the applicable policy statements by the Sentencing Commission");

Carrington v. United States, 503 F.3d 888, 890-91 (9th Cir. 2007) (finding Booker is not pari passu with an amendment to the Guidelines sufficient to provide a basis for reducing a defendant's sentence under § 3582(c)(2)); United States v. Carter, 500 F.3d 486, 490-91 (6th Cir. 2007) (same); McMillan v. United States, 257 F. App'x 477, 479 (3d Cir. 2007) (same) (not precedential); Cortorreal v. United States, 486 F.3d 742, 744 (2d Cir. 2007) (holding Booker cannot be the basis for a reduction of sentence under § 3582(c)(2)).

Furthermore, the Third Circuit in Doe held that Booker only "applies to full sentencing hearings -- whether in an initial sentencing or in a resentencing where the original sentence is vacated for error," but not to sentence modification proceedings under § 3582(c)(2). Doe, 564 F.3d at 313 (quoting United States v. Dunphy, 551 F.3d 247, 253 (4th Cir. 2009)); see also United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002) (citing United States v. Faulks, 201 F.3d 208, 210 (3d Cir. 2000) (distinguishing a "full resentencing" from a reduction of sentence under § 3582(c)(2)); but see United States v. Hicks, 472 F.3d 1167 (9th Cir. Alaska 2007) (holding that under Booker, the Sentencing Guidelines are not mandatory in all contexts.) Here, since Petitioner is not entitled to relief under § 3582(c)(2), Booker has no effect on Petitioner's sentence.

III. Conclusion

For the reasons set forth above, the motion for a reduction in sentence will be denied. An appropriate order follows.

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LEROY JACKSON a/k/a “Skip,”	:	

O R D E R

AND NOW, this **29th day of July 2009**, it is hereby **ORDERED** that, for the reasons set forth in the accompanying memorandum, the motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) (docs. no. 135) is hereby **DENIED**.

IT IS FURTHER ORDERED that Petitioner’s motion for leave to file a reply (doc. No. 138) is **GRANTED.**

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.